IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 38

WCC No. 2009-2320

GAYLE BROWN

Petitioner

vs.

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner worked full-time cutting hair at a salon and began to experience pain and numbness in her hands and wrists. A PA-C diagnosed her with carpal tunnel syndrome and requested referral to a physician. Respondent did not grant the referral until after it denied Petitioner's claim, citing a lack of causative evidence within the 30-day investigative period. Although the physician disagreed with the specific diagnosis of carpal tunnel syndrome, he concluded that Petitioner suffered from "an occupational disease related to overuse." Respondent again denied the claim, asserting that the physician's diagnosis was "ambiguous." Petitioner's employer then discontinued allowing her to work in a modified position to accommodate her restrictions, stating that it provided modified positions only for workers with accepted workers' compensation claims. Petitioner argues that she is entitled to acceptance of her claim, medical and indemnity benefits, and her costs, attorney fees, and a penalty for Respondent's unreasonable denial of her claim.

Held: Respondent is liable for Petitioner's occupational disease claim. Petitioner is entitled to medical and indemnity benefits. Respondent unreasonably denied Petitioner's claim and Petitioner is entitled to her attorney fees and a 20% penalty.

¶ 1 The trial in this matter was held on October 7, 2009, at the law office of James G. Edmiston in Billings, Montana. Petitioner Gayle Brown (Brown) was present and represented by James G. Edmiston. Respondent Hartford Insurance Company of the Midwest (Hartford) was represented by William O. Bronson.

¶ 2 Exhibits: I admitted exhibits 1 through 13 without objection.
¶ 3 Witnesses and Depositions: The parties stipulated that the Court could rely on an electronic version of Petitioner's deposition to issue a bench ruling. An official copy of Petitioner's deposition was filed with the Court on November 17, 2009. Petitioner Gayle Brown, Linda Slavik (Slavik), and Aimee Hope (Hope) were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:[1]

¶ 4a Whether the insurer is liable for Petitioner's occupational disease claim for overuse of her bilateral upper extremities as a result of the repetitive trauma of hair styling.

¶ 4b Whether Respondent is liable for paying occupational disease benefits to Petitioner retroactive to 2/13/09 less the statutory waiting period.

¶ 4c The amount of Petitioner's correct TTD and PPD rates.

¶ 4d If Respondent is liable for Petitioner's occupational disease claim, the nature and amount of any medical and indemnity benefits to which she may be entitled.

¶ 4e Whether Petitioner is entitled to an award of attorney fees and costs pursuant to §§39-71-611/612, MCA (2007).

¶ 4f Whether Petitioner is entitled to an award of the twenty percent penalty under §39-71-2907, MCA (2007).

¶ 5 At trial, the parties stipulated that they had resolved the issue of Brown's correct temporary total disability (TTD) and permanent partial disability (PPD) rates.[2] Therefore, this issue is resolved and will not be discussed further in this decision.

¶ 6 At the close of arguments, I issued a bench ruling pursuant to ARM 24.5.335 following a brief recess. These findings and conclusions are in accordance with that ruling.

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[1] Pretrial Order at 2.

[2] The parties stipulated that Brown's gross average weekly wage is $446.97, and that her correct TTD and PPD rate would be $297.98.

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FINDINGS OF FACT

¶ 7 Unless otherwise noted below, I found the testimony of the witnesses at trial to be credible.

¶ 8 Brown is a licensed cosmetologist who completed her studies at the College of Coiffeur Art in Billings.[3] Brown testified at trial. Brown has worked at various hair-styling salons in Billings for the past 20 years. On July 11, 2008, Master Cuts hired her as a manager. As the manager, Brown needed to be the top performer at the salon. She was responsible for setting up the salon, changing its displays each month, stocking, ordering, and scheduling employees. She also performed regular employee duties such as cleaning.[4] Brown's supervisor was the area supervisor, Jolinda Olson (Olson), who was based in Auburn, Washington. Brown called Olson at least once a week or more frequently as needed.[5]

¶ 9 In approximately November 2008, Brown began to experience pain in her hands. The salon was short-staffed and she was working long hours. The salon became busier as the holidays approached. On a typical day, Brown went to the salon at approximately 4 or 5 a.m. Her shift ended at 2 p.m., but she often stayed later. Brown explained that on many days, the stylists could not meet the needs of all the waiting customers. On an average day during the 2008 holiday season, Brown performed 15 to 20 haircuts.[6] Brown also had numbness in her hands and she started dropping her electric clippers. On one occasion, she dropped her clippers and did not realize they had fallen out of her hand. She then decided to have her hands examined.[7]

¶ 10 PA-C Ronald K. Handlos (PA-C Handlos) saw Brown at the Billings Clinic on December 18, 2008.[8] PA-C Handlos told Brown that she had symptoms of carpal tunnel

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[3] Brown Dep. 6:7-17; 7:21-25.

[4] Trial Test.

[5] Brown Dep. 9:20 - 10:11.

[6] Trial Test.

[7] Brown Dep. 18:1-16.

[8] Ex. 1 at 1-2.

syndrome. Brown was upset about the diagnosis and she was very stressed at the thought of having to tell Olson. Brown testified that Olson got angry when Brown asked for time off and Brown no longer asked for vacation time because of her supervisor's angry reaction. Brown stated that as she thought about the consequences of telling her supervisor about her diagnosis, she had an anxiety attack.[9] PA-C Handlos noticed that her anxiety level was increasing and she was complaining of progressive numbness. He summoned an ambulance to transport Brown to the emergency room at the Billings Clinic Hospital.[10]

¶ 11 The December 18, 2008, Emergency Room Report states that Brown reported that she first noted tingling and numbness in her right hand approximately six weeks previously. This had progressed to the point where Brown's entire right arm felt numb and tingly, and she had a weak grip and difficulty holding implements with her right hand. She also noted progressing symptoms in her left arm for the past two weeks. On December 18, she developed numbness and tingling in her right leg. After a thorough examination and medical tests, the providers found no known etiology for her parasthesias and discharged her.[11]

¶ 12 Brown testified that she had experienced an anxiety attack on one previous occasion, which was in May 2007 while she was going through a divorce. Regarding the December 2008 anxiety attack at the hospital, Brown had more tests performed, including an MRI. She was eventually released that day and instructed to take at least one day off work. Brown called Olson, who became very upset, and asked her how she would get someone to cover her shift. Brown informed her supervisor that PA-C Handlos had restricted her duties and that she intended to follow PA-C Handlos' restrictions. Her supervisor then acquiesced.[12]

¶ 13 PA-C Handlos treated Brown again on January 6, 2009. Upon his examination, PA-C Handlos found positive Tinel's and Phalen's at both carpal tunnels on Brown's right and left hands. PA-C Handlos recommended that Brown use splints at night and while driving, and that she should avoid continuous grasping, continuous use of vibrating impact pneumatic tools, and overhead work. He further noted that Brown needed

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[9] Trial Test.

[10] Ex. 1 at 1-2.

[11] Ex. 3 at 12-14.

[12] Trial Test.

to be seen by Dr. John H. Petrisko per the insurer's request for a determination of workability or work-relatedness.[13]

¶ 14 Brown recalled that PA-C Handlos' initial restrictions required her to cut for 45 minutes and then rest for 15 minutes, during which time she was supposed to perform a specific hand exercise. PA-C Handlos also restricted Brown from using electric clippers and instructed her to hold her hands in a specific manner to prevent them from going numb. He also prescribed physical therapy.[14]

¶ 15 Slavik is the resident Montana adjuster for Hartford. Slavik testified at trial. Slavik was not the initial adjuster on Brown's claim. The first adjuster was Jim Kimmel (Kimmel), who worked for SRS, a third-party administrator for Hartford. Kimmel denied liability for Brown's claim on behalf of Hartford. Slavik testified that Kimmel worked for Hartford until February 2009; however, Kimmel was behind on some of his work prior to his departure and Slavik assisted Kimmel on keeping Brown's claims file updated.[15]

¶ 16 On January 6, 2009, Kimmel noted in the claims file:

> Received call from PA-C Ron Handlos: He does not believe that the claimant's symptoms are occupationally related, however, he can not state this without having the claimant seen by a doc in Occupational Medicine. Advised that I would authorize the referral to Occ Medicine to determine causation.[16]

¶ 17 PA-C Handlos again treated Brown on January 13, 2009. He noted that her hand pain and numbness continued to worsen even when she was off work. He again saw Tinel's and Phalen's at both the right and left carpal tunnels and some positive radial tunnel. He asked Brown to follow up with the insurer again to request an appointment with Dr. Petrisko for a workability or work-relatedness determination. PA-C Handlos diagnosed bilateral carpal tunnel symptoms and took Brown completely off work.[17]

¶ 18 On January 15, 2009, Kimmel noted:

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[13] Ex. 1 at 8-9.

[14] Trial Test.

[15] Trial Test.

[16] Ex. 6 at 14.

[17] Ex. 1 at 10-11.

> Received call from claimant: Advised that I just faxed over authorization for referral to Dr. Petrisko for determination of causation. In the mean time, I will deny this claim pending his report.[18]

¶ 19 Slavik believes Kimmel denied Brown's claim on January 15, 2009, because the 30-day investigation period had expired. At the time Kimmel denied the claim, Brown had not yet been seen by Dr. Petrisko and the only medical records in the file were from PA-C Handlos.[19] Contrary to Kimmel's claims file notes, PA-C Handlos' medical notes give no indication that he did not believe Brown's hand and wrist condition was work-related. PA-C Handlos next treated Brown on January 20, 2009. He again noted objective medical findings of carpal tunnel syndrome and continued to keep Brown off work.[20]

¶ 20 Dr. Petrisko first examined Brown on February 5, 2009. He reviewed PA-C Handlos' medical records, the emergency room report, and older preinjury medical records. He examined Brown after interviewing her about her symptoms. Dr. Petrisko found negative Tinel's and Phalen's in both hands. Dr. Petrisko diagnosed Brown with overuse and some strain symptoms in both hands and wrists, right greater than left. He did not find evidence of carpal tunnel syndrome. He opined that Brown was not at MMI. Dr. Petrisko placed work limitations on Brown of limited wrist motion on the right and no continuous hair cutting with a break every 45 minutes.[21]

¶ 21 Dr. Petrisko further stated:

> In regards to the occupational disease questions posed to me today by Mr. Jim Kimmell, Account Specialist with SRS, I can answer that ***the patient is suffering from an occupational disease related to overuse of the right and left upper extremities*** as described above. I do not feel she is suffering from any occupational disease related to any neurologic deficits, particularly carpal tunnel symptoms. Additionally, no evidence of any work relatedness to her previous episode of anxiety and right lower extremity numbness and tingling complaints as well as whole arm numbness and tingling complaints. It is my opinion that the workup for those complaints in

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[18] Ex. 6 at 14.

[19] Trial Test.

[20] Ex. 1 at 12-14.

[21] Ex. 4 at 1-7.

> the emergency department are not work related. ***The only objective findings and historical findings I have today for work relatedness are as I described the overuse and strain of the right and left hand and wrist***. . . .[22]

¶ 22 PA-C Handlos again treated Brown on February 12, 2009, noting that she had returned to work but continued to experience significant pain and numbness in her hands. PA-C Handlos restricted her to cutting for 45 minutes with a 15-minute break each hour.[23]

¶ 23 On February 13, 2009, Kimmel noted:

> Discussed eval of 2/5/09 with Dr. Petrisko-notes wil [sic] be coming in the future but he has diagnosed claimant with overuse syndrome. Claimant does not have CTS. Claimant does have a history of bilateral upper extremity symptoms. Current symptoms are not occupationally related.[24]

Again, Kimmel's assertion that Brown's symptoms "are not occupationally related" is in direct contradiction to the medical notes of both PA-C Handlos and Dr. Petrisko. Dr. Petrisko specifically stated that Brown suffered from an occupational disease, and yet Kimmel continued to deny liability on the basis that Brown's symptoms were allegedly not work-related.

¶ 24 Slavik testified that she was confused as to how Dr. Petrisko diagnosed overuse syndrome when he saw no neurologic deficits, and she further found it confusing that PA-C Handlos diagnosed carpal tunnel syndrome, while Dr. Petrisko did not. Slavik stated that after reading Dr. Petrisko's notes, she was unclear whether Dr. Petrisko saw objective medical findings to support his diagnosis, and so she denied Brown's claim. However, she admitted that, although she was confused by Dr. Petrisko's February 5, 2009, treatment note, she made no attempts to rectify this confusion until at least May 2009 when she reviewed the file in response to Brown obtaining legal counsel. Slavik testified that she knew from Dr. Petrisko's medical notes that he believed Brown suffered from an occupational disease related to the overuse of her arms. However, since Dr. Petrisko stated that Brown had no neurologic deficits and that her anxiety attack was not work-related, Slavik testified that she found Dr. Petrisko's conclusion that Brown suffered an

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[22] Ex. 4 at 7. (Emphasis added.)

[23] Ex. 1 at 14-15.

[24] Ex. 6 at 13.

occupational disease "ambiguous." She therefore continued to deny Brown's workers' compensation benefits. Slavik decided to wait until Brown saw Dr. Petrisko again to seek clarification. She decided not to contact Dr. Petrisko to seek clarification in the interim. Slavik further explained that from the time Kimmel left in February 2009, until she was assigned the file in May 2009, the file sat inactive without a claims adjuster assigned to it.[25]

¶ 25 Brown testified that her employer initially accommodated her restrictions. However, once Hartford denied her claim, Olson informed her that Master Cuts would no longer accommodate her restrictions. Brown was at work on February 13, 2009, when Olson called and told her to vacate the premises immediately. Brown later participated in a conference call with Olson and with the regional manager. The regional manager informed Brown that she was not being fired, but that she could not return to work with any restrictions.[26] Brown's last day of work was February 13, 2009.[27]

¶ 26 On March 6, 2009, PA-C Handlos reduced Brown's restrictions to needing a 5- to 10- minute break from cutting hair each hour. On the Medical Status Report he issued on that date, he noted his diagnosis as "overuse [right] & [left] hand."[28] PA-C Handlos next saw Brown on March 24, 2009. He noted that Brown had been seen by Dr. Petrisko in the interim and that Dr. Petrisko diagnosed her with overuse. On examination, PA-C Handlos again observed positive Tinel's and Phalen's on both the right and left side.[29]

¶ 27 On May 12, 2009, Slavik wrote to Brown's counsel and stated that Hartford had denied liability for Brown's claim on January 15, 2009, because the time to investigate the claim had expired and, "there still was no definite diagnosis and no objective medical findings to show the relationship between the occupational duties and the symptoms reported." Slavik added that Brown had suffered "cervical and upper extremity problems" from a 2000 motor vehicle accident and suggested that her current problems may be attributable to that.[30] However, after that accident, Brown complained of tightness and pain in her neck, but had no complaints about her arms.[31] There is no indication in the

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[25] Trial Test.

[26] Trial Test.

[27] Trial Test.

[28] Ex. 1 at 18.

[29] Ex. 1 at 21-22.

[30] Ex. 11 at 1.

[31] Ex. 4 at 3.

records presented to this Court that ***any*** medical provider believed that ***any*** connection possibly existed between Brown's 2000 motor vehicle accident and her present hand and wrist complaints.

¶ 28 On June 1, 2009, Slavik noted, "Dr[.] Petrisko ruled out carpal tunnel as not related to work duties, however, Dr. did relate upper extremity pain complaints in hands and wrists to work duties."[32] However, in spite of her acknowledgment that Dr. Petrisko diagnosed Brown with work-related upper extremity pain, Slavik did not accept liability for Brown's condition. Slavik further noted that a physician's assistant had diagnosed Brown with carpal tunnel syndrome after observing positive Tinel's and Phalen's, but Slavik denied further treatment: "Claim does not meet definition of injury. Dr. Petrisko determined that carpal tunnel is not related."[33] Slavik further noted that Brown's claim had been denied January 15, 2009, "based upon lack of objective medical findings to show relationship between condition and occupational duties."[34]

¶ 29 On June 24, 2009, Slavik noted in her adjuster's notes:

> Discussed claim and mediation with Todd Kirschner at MasterCuts. He explained that they provide modified duty only on work comp injuries and when claim was denied, modified duty was not available. However, he also explained he and the district manager talked to Gayle [Brown] and told her in order to return to work, she had to be released to cut hair at least part of the day. They did not have enough desk work to keep her busy. . . .[35]

Although Slavik's note seems to suggest that Brown could return to work at Master Cuts if she could cut hair part of the day, Brown testified that Master Cuts refused to allow her to return to work with any restrictions. Furthermore, the medical records indicate that Brown was released to cut hair at least part of the day at this time, but that she required the accommodation of frequent brief breaks.[36] I find Brown's testimony that Master Cuts refused to allow her to return to work so long as she had any restrictions to be more credible, and my finding is in accordance with that testimony.

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[32] Ex. 6 at 10.

[33] Ex. 6 at 11.

[34] Ex. 6 at 11.

[35] Ex. 6 at 9.

[36] See ¶ 26, above.

¶ 30 On August 3, 2009, Dr. Petrisko completed a medical status report in which he diagnosed Brown with wrist and hand overuse, right greater than left, and noted that she was not at maximum medical improvement (MMI), but could return to work without restriction.[37] Dr. Petrisko reviewed Brown's intervening medical reports and examined Brown after interviewing her about her symptoms. Dr. Petrisko found that Brown had a positive Phalen's on the right. He diagnosed her with bilateral overuse syndrome and strain complaints in her hands and wrists, right greater than left, "with possible new onset of right carpal tunnel symptoms that I have documented today with a positive Phalen's on the right." Dr. Petrisko released Brown to return to work without restrictions.[38]

¶ 31 Nurse case manager Hope also attended the August 3, 2009, appointment. Brown testified that Hope asked Dr. Petrisko to assist in formulating a plan to get Brown back to work, and Dr. Petrisko refused. He released Brown to return to work without restrictions, but indicated that she was not at MMI.[39]

¶ 32 Slavik testified that she reviewed Dr. Petrisko's notes after Brown's August appointment to resolve her confusion, but she again found Dr. Petrisko's notes to be unclear. By then, the claim was in litigation, so Slavik did not seek further clarification. Slavik testified that at the time of trial, it continued to be her and Hartford's position that Brown does not have a compensable claim for overuse syndrome of her arms.[40]

¶ 33 After Dr. Petrisko released her to return to work without restrictions in August, Brown left Olson several messages. Olson did not return Brown's calls, and Brown then contacted the regional manager to ask about returning to work. The regional manager did not return Brown's phone call. In September 2009, Olson left her a message indicating that no position was available for her at Master Cuts because her job had been filled. Once Brown learned that she could not return to Master Cuts, she began looking for other employment. She currently works at Planet Beach selling spa packages. Brown works less than 25 hours per week at Planet Beach and is paid minimum wage plus commission.[41]

CONCLUSIONS OF LAW

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[37] Ex. 4 at 9.

[38] Ex. 4 at 10-12.

[39] Trial Test.

[40] Trial Test.

[41] Trial Test.

¶ 34 Brown's last day of work for Master Cuts was February 13, 2009. The 2007 Workers' Compensation Act applies to her claim.[42]

¶ 35 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[43]

Issue One: Whether the insurer is liable for Petitioner's occupational disease claim for overuse of her bilateral upper extremities as a result of the repetitive trauma of hair styling.

¶ 36 Under § 39-71-407(8)-(9), MCA, an employer is liable for an occupational disease if it arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the occupational disease is established by objective medical findings and events occurring on more than a single day or work shift are the major contributing cause of the occupational disease.

¶ 37 Under § 39-71-116(19), MCA, '"[0]bjective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings." Both PA-C Handlos and Dr. Petrisko found evidence, substantiated by their clinical findings, that Brown suffers from a bilateral strain or overuse condition related to her employment. Brown's uncontroverted testimony is that she used her hands and wrists continuously at work, and that her symptoms developed and then worsened in proportion to an increase in haircutting duties during her work shifts. Hartford has presented no contrary medical evidence. I therefore conclude that Hartford is liable for Brown's occupational disease claim for overuse of her bilateral upper extremities as a result of the repetitive trauma of hairstyling.

Issue Two: Whether Respondent is liable for paying occupational disease benefits to Petitioner retroactive to 2/13/09 less the statutory waiting period.

¶ 38 Under § 39-71-701(1), MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or until the worker has been released to return to the employment in which the

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[42] G*renz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

[43] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

worker was engaged at the time of the injury or to employment with similar physical requirements. Section 39-71-701(4), MCA, further states:

> If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer . . . , the worker is no longer eligible for [TTD] benefits even though the worker has not reached maximum healing. A worker requalifies for [TTD] benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration . . . , resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled . . . .

¶ 39 In the present case, Brown's employer ceased to make a modified position available to her as of February 13, 2009. Although Dr. Petrisko released Brown to return to her time-of-injury position in August 2009, Master Cuts informed Brown that her position was no longer available. Hartford is liable for paying occupational disease benefits to Brown retroactive to February 13, 2009, less the statutory waiting period.

Issue Four: If Respondent is liable for Petitioner's occupational disease claim, the nature and amount of any medical and indemnity benefits to which she may be entitled.

¶ 40 As set forth above, I have concluded that Hartford is liable for Brown's occupational disease claim. The parties further ask the Court to specifically set forth the nature and amount of the benefits due. To that end, the parties have submitted 30 pages of medical bills as a trial exhibit.[44] Hartford has argued that, even if it is found liable for Brown's alleged occupational disease, it should not be liable for the medical bills associated with Brown's December 18, 2008, emergency room visit. Hartford raised no other objection to the medical bills submitted by stipulation. Aside from bills arising from Brown's December 18, 2008, emergency room visit, the parties have not alerted the Court to any other medical bills being disputed on an individual basis. As discussed below, I do not believe the emergency room visit is compensable. With respect to the remaining medical bills, I believe the parties are able to sift through them and agree on the specific dollar amount owed. I will reserve jurisdiction on this issue to determine the specific amount owed in the event the parties are unable to agree.

[44] Ex. 8.

¶ 41 As to whether Brown's December 18, 2008, emergency room visit is related to her occupational disease and therefore compensable, I conclude that it is not. This episode was determined to be an anxiety attack. Dr. Petrisko specifically noted that there was no evidence of any work-relatedness to this episode and opined that the workup for those complaints in the emergency department was not work-related. Although Brown testified that her anxiety attack was caused by her fear of telling her supervisor that she had just been diagnosed with an occupational disease, in light of Dr. Petrisko's testimony, I must conclude that Brown has failed to meet her burden of proof in establishing the compensability of her emergency room visit.

¶ 42 No evidence was presented that suggests Brown has reached MMI. Therefore, any rulings as to her potential entitlement to PPD benefits would be premature. At this point in time, she is eligible for retroactive TTD benefits as noted above at paragraph 38.

¶ 43 Brown testified at trial that she had recently begun working part time at Planet Beach selling spa packages. She testified that she works fewer hours and for a lower rate of pay than she received at Master Cuts. The issue of whether Brown now qualifies for temporary partial disability (TPD) was not argued at trial. As I indicated in my bench ruling at trial, in light of my rulings in this case, I believe the parties can likely reach agreement on Brown's potential entitlement to TPD benefits. I will reserve jurisdiction on this issue in the event the parties are unable to agree.

Issue Five: Whether Petitioner is entitled to an award of attorney fees and costs pursuant to §§39-71-611/612, MCA (2007).

¶ 44 As the prevailing party, Brown is entitled to her costs.[45] As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later judged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. I have concluded that Hartford is liable for Brown's occupational disease claim and concomitant benefits as detailed above. I further conclude that Hartford's actions in denying liability were unreasonable. As set forth in the facts above, no evidence was presented by Hartford to suggest that Brown is not suffering from an occupational disease. Hartford argues solely that its adjuster's "confusion" as to the diagnoses from PA-C Handlos and Dr. Petrisko justified denying Brown's claim in its entirety rather than seeking clarification of the diagnoses. Going back to Hartford's initial denial of liability, the Court has an adjuster's note from Kimmel which states that he reviewed PA-C Handlos' December 18, 2008, medical note and did not believe Brown's condition was work-related.

[45] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

Kimmel's conclusion, however, is in direct contradiction to the information PA-C Handlos noted. At the time Kimmel denied Brown's claim, the only medical evidence was PA-C Handlos' diagnosis that Brown suffered from carpal tunnel syndrome. Inexplicably, Kimmel recorded just the opposite in his notes.

¶ 45 Brown was eventually seen by Dr. Petrisko, who diagnosed her with overuse syndrome and issued work restrictions to limit Brown's overuse of her extremities. In Dr. Petrisko's medical notes from that appointment, he unequivocally states that he believes Brown ***is*** suffering from an occupational disease. However, Hartford continued to deny liability on the grounds that Brown's condition was ***not*** work-related. PA-C Handlos had recorded objective medical findings from Brown's first appointment forward, and both he and Dr. Petrisko found her to have a work-related occupational disease. While Slavik testified that she felt that Dr. Petrisko's medical notes from Brown's February 2009 appointment required clarification, neither she nor any other representative of Hartford sought clarification for 7 months, until Brown saw Dr. Petrisko for a second time in August 2009. In August 2009, Dr. Petrisko again found Brown to be suffering from an occupational disease and noted symptoms of carpal tunnel syndrome for the first time, yet Hartford continued to deny liability for Brown's claim and Slavik again asserts that Dr. Petrisko's medical notes were not clear enough to satisfy her.

¶ 46 Kimmel's claims adjusting notes repeatedly contradicted the medical notes of both PA-C Handlos and Dr. Petrisko. After Kimmel left, Slavik's testimony is that Brown's claims file sat for 4 months with no adjuster assigned to the claim and no one seeking clarification of Dr. Petrisko's opinion. I conclude that Hartford acted unreasonably in denying Brown's claim and in continuing to maintain the denial with no medical evidence to support the denial. Therefore, Brown is entitled to her attorney fees pursuant to § 39-71-611, MCA.

Issue Six: Whether Petitioner is entitled to an award of the twenty percent penalty under §39-71-2907, MCA (2007).

¶ 47 Pursuant to § 39-71-2907, MCA, the Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable. For the same reasons as I find attorney fees are owed, I award a penalty amounting to 20% of the full amount of benefits due Brown.

JUDGMENT

¶ 48 Respondent is liable for Petitioner's occupational disease claim for overuse of her bilateral upper extremities as a result of the repetitive trauma of hair styling.

¶ 49 Respondent is liable for paying occupational disease benefits to Petitioner retroactive to February 13, 2009, less the statutory waiting period.

¶ 50 Petitioner is entitled to TTD benefits up to the time she began working at Planet Beach. The Court reserves jurisdiction as to the issue of Petitioner's potential entitlement to TPD benefits after she began working at Planet Beach.

¶ 51 Respondent is liable for Petitioner's medical costs associated with her occupational disease. Respondent is not liable for the bills associated with Petitioner's emergency room treatment of December 18, 2008.

¶ 52 Petitioner is entitled to an award of attorney fees and costs pursuant to §§ 39-71-611, -612, MCA.

¶ 53 Petitioner is entitled to an award of a 20% penalty pursuant to § 39-71-2907, MCA.

¶ 54 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

¶ 55 Pursuant to ARM 24.5.335(1)(c), the parties' deadlines to file motions for reconsideration and other post-decision filings will run from the date this written document is issued.

DATED in Helena, Montana, this 16th day of December, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Edmiston
William O. Bronson
Submitted: November 17, 2009